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FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 901 NEW YORK AVENUE, NW WASHINGTON, DC 20001-4413			GOLLAMUDI, SHARMILA S	
			ART UNIT	PAPER NUMBER
			1616	

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Please find below and/or attached an Office communication concerning this application or proceeding.

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DETAILED ACTION

Receipt of the Oath filed 4/6/04 is acknowledged. Claims 1-25 are pending in this application.

Priority

Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

Information Disclosure Statement

The information disclosure statement (IDS) submitted on 11/7/03 has been considered by the examiner.

Claim Objections

Claim 3 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. The independent claim requires "at least one anionic fixing polymer present in an amount ranging from 0.5 to 10%" and thus the limitation in claim 3 of "at least one anionic fixing polymer present in an amount ranging from 0.5 to 10%" does not further limit the parent claim.

Claim Rejections - 35 USC § 102

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-10 and 12-25 are rejected under 35 U.S.C. 102(e) as being anticipated by

Bolich et al (6,635,240).

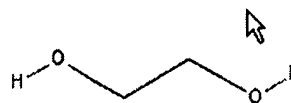
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Bolich discloses an aerosol hair styling compositions which comprise (a) from about 5% to about 90% of a water-soluble polyalkylene glycol (polyol) that has a number average molecular weight of from about 190 to about 1500 and from about 5 to about 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms; (b) from about 1% to about 90% of a liquid carrier; and (c) from about 5% to about 40% of a propellant. See column 3, lines 20-30. The aerosol hair styling compositions provides improved dry hair restyling performance for several days without the need to reapply the composition or add any other styling aid on the hair. See column 3, line 65 to column 4, line 16. The composition is packaged into an aerosol dispenser. See column 16, lines 13-26.

Bolich discloses the concentration of the polyalkylene glycols are generally in a range from about 1% to about 90%, preferably from about 3% to about 75%, more preferably from about 7.5% to about 50%, even more preferably from about 10% to about 25%, by weight of the composition. Specific examples of the preferred polyalkylene glycols include polyethylene/polypropylene glycol copolymers, triglycerin, hexaglycerin, PEG-4, PEG-6, PEG-5, PEG-6, PEG-8, PEG-12, PEG-14, PEG-18, PEG-20, PEG-32, and mixtures thereof. Specific examples of the most preferred polyalkylene glycols include, but are not limited to, PEG-4; PEG-8 (PEG-8 is also known as Carbowax 400); and PEG-12 (PEG-12 is also known as Carbowax 600, which is available from Union Carbide). See column 6, lines 20-45 and examples. PEG is abbreviated for polyethylene glycols. Note the examples utilize Carbowax 300 and 400, which have a molecular weight less than 500 and instant carbon atoms. It is the examiner's position that PEGs read on claim 12 since the two carbon atoms (C-C) are considered

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a hydrocarbon chain (the specification does not give a definition of the length of the hydrocarbon chain) and since the two carbons are continuous this reads on “not interrupted by a heteroatom”.



For instance, Carbowax 300 has a formula of

where the two carbons that are continuous and thus reads on claim 12.

Bolich discloses additional styling agents to help improve initial hair hold performance in an amount of about 0.25% to about 5%, preferably from about 0.5% to about 4.0%, by weight of the compositions. See column 6, lines 45-55. Bolich teaches the use of polysaccharide styling polymers selected from anionic polysaccharides, cationic polysaccharides, and nonionic polysaccharides. See column 7, lines 1-5 and example XIX-XX.

Bolich also discloses the hair styling compositions further comprises a gelling agent to help provide the desired viscosity and it also helps to provide for improved hair hold in an amount from about 0.1% to about 10%, preferably from about 0.2% to about 5.0%, by weight of the compositions. Bolich teaches the preferred crosslinked carboxylic acid polymers are those crosslinked carboxylic acid homopolymers or copolymers, which contain unneutralized acid monomers (anionic polymer). Bolich teaches the preference for crosslinked carboxylic acid polymers which have unneutralized acid monomers is due to the fact that they are effective in providing gelling properties to the residue without suppressing the ease of removability of the residue by shampooing the hair. See column 12, line 64 to column 13, line 5 and examples XV-XVI, which utilize Carbopol 934, which is an anionic polymer.

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Bolich discloses the liquid carrier can comprise one or more liquid carriers provided that the selected styling agent is sufficiently miscible or dispersible in the selected liquid carrier. Preferred C1 -C6 alkanols include monohydric alcohols such as ethanol, isopropanol, and mixtures thereof. When the hair styling compositions comprise combinations of water and an organic solvent such as C1-C6 alkanols, water is preferably included at concentrations of from about 40% to about 90%, more preferably from about 50% to about 90%, even more preferably from about 60% to about 90%; and the alkanols are preferably included at total concentrations of from about 1% to about 15%, more preferably from about 3% to about 15%, even more preferably from about 5% to about 10%, by weight of the composition. See column 8, lines 15-60 and examples.

Bolich discloses the total concentration of the propellant in the aerosol hair styling composition include one or more propellants and the total propellant concentration ranging from about 5% to about 40%, preferably from about 5% to about 25%, more preferably from about 5% to about 15%, by weight of the composition. Suitable propellants taught include hydrocarbons, nitrogen, carbon dioxide, nitrous oxide, atmospheric gas, 1,2-difluoroethane, dimethylether, and mixtures thereof. Suitable hydrocarbon propellants include propane, butane, and isobutane. See column 11, lines 15-25 and examples.

Bolich discloses optional materials including preservatives, surfactants, conditioning polymers, electrolytes, fatty alcohols, hair dyes, antidandruff actives, odor masking agents, pH adjusting agents, perfume oils, perfume solubilizing agents, sequestering agents, emollients, lubricants and penetrants such as various lanolin compounds, protein hydrolysates and other

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protein derivatives, sunscreens, volatile silicone fluids, and isoparaffins. See column 15, lines 50-65 and examples.

Claims 1-25 are rejected under 35 U.S.C. 102(b) as being anticipated by Birkel et al (2001/0003584).

Birkel discloses a hair composition comprising (a) a terpolymer present in the composition in an amount of 0.01 to 20% and (b) a anionic polymer present in an amount of from 0.01 to 20%, especially preferably of 0.05 to 10%, and most preferably from 0.1 to 5%. See [0008]. The polymer (B) can be a homopolymer or copolymer with monomer units containing acid groups on a natural or synthetic basis. Suitable monomers containing acid groups include, for example, acrylic acid, methacrylic acid, crotonic acid, maleic acid and/or maleic acid anhydride, maleic acid monoester, especially the mono-C1- to C7-alkyl ester of the maleic acid and aldehydocarboxylic acids or ketocarboxylic acids. Suitable polymer compounds with acid groups include cross-linked or uncross-linked vinyl acetate/crotonic acid copolymers; vinyl acetate/crotonic acid/vinyl alkanoate copolymers; VA/crotonates/vinyl neodecanoate copolymer; copolymers of one or more C1- to C5-alkylacrylates, especially C2- C4-alkylacrylates and acrylic acid or methacrylic acid; etc. See [0017]; [0020]; and examples.

Birkel discloses the composition is packaged in an aqueous, alcoholic or an aqueous-alcoholic medium preferably with at least 10 percent by weight water. Lower alcohols with 1 to 4 carbon atoms, such as ethanol and isopropanol, can be contained. See [0026] and examples. Examples utilize 10% water and above. Thus, instant claims 16-18 which claim 10-54.54%; 10-45%; 10-30% are anticipated.

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Organic solvents or a mixture of such solvents can be contained in the composition. Ethylene glycol (polyol), glycerol (polyol), and propylene glycol (polyol) in amount of up to 30 percent by weight are especially preferred water-soluble solvents. See [0027]. It is the examiner's position that Birkel anticipates the instant invention since the use of the polyol (ethylene glycol, glycerol, and propylene glycol) can be immediately envisaged by an artisan. Note that up to 30% encompasses the instant range of at least 15% wherein 15-30% is anticipated by the prior art. Therefore, when a claimed range that touches, overlaps, or falls within a claimed range, it is anticipated. See MPEP 2144.05 I-II. This also applies to the dependent instant claims of 6-8. Further, note that ethylene glycol, glycerol, and propylene glycol reads on instant claims 12-14.

The composition is employed in various application forms including a lotion, as a non-aerosol spray solution, which is sprayed by means of a mechanical apparatus for spraying, as an aerosol spray which is sprayed by means of a propellant, as an aerosol-foam or as a non-aerosol foam, as a hair cream, and as a hair wax. See [0029]. Specifically, Birkel discloses if the hair treatment composition is in the form of an aerosol spray, it contains 15 to 85%, preferably 25 to 75% by weight of a propellant and is filled into a pressurized container. Example of propellants disclosed include lower alkanes, including n-butane, i-butane and propanes, dimethyl ether (DME) or fluorinated hydrocarbons be used as the propellant. See [0030] and examples. Example 4 discloses a composition packaged in an aerosol can, in a ratio 45:55 (composition:DME).

Birkel discloses cosmetic additive for the composition include wetting agents or emulsifiers from the classes of nonionic, anionic, cationic or amphoteric surface-active

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substances, such as fatty alcohol sulfates, alkylbenzene sulfonates, alkyltrimethyl ammonium salts, alkyl betaines, in an amount of from 0.1 to 15%; moisturizing agents; perfumes, in an amount of from 0.1 to 0.5%; turbidity-inducing agents, such as ethylene glycol distearates, in an amount of about 0.2 to 5.0%; buffer substances, such as sodium citrate or sodium phosphate, in an amount of 0.1 to 1.0%; care materials, such as plant and vegetable extracts, protein and silk hydrolyzates, lanolin derivative compounds, in an amount of from 0.1 to 5%; silicone derivative compounds, including volatile or non-volatile silicone oils or high molecular weight siloxane polymers, in an amount of from 0.05 to 20%. See [0028] and examples.

Birkel discloses the composition discloses the method for improving film-forming and hair-fixing properties wherein the composition is applied to the hair to fix the style. See [0006] and examples on page 4.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-8, 15-23, and 25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-29 of copending Application No. 10/796016.

The instant application is directed to an aerosol composition packaged in an aerosol device, comprising: a) at least one anionic fixing polymer present in an amount ranging from 0.5% to 10% by weight, based on the total weight of the aerosol composition, b) at least one polyol with a molecular weight less than 500, present in an amount greater than 15% by weight, based on the total weight of the aerosol composition, c) an aqueous-alcoholic or aqueous medium comprising at least 10% by weight of water, based on the total weight of the aerosol composition, and d) at least one propellant gas in an amount greater than or equal to 30% by weight, based on the total weight of the aerosol composition.

'016 is directed to an aerosol device comprising a) a cosmetic composition comprising a cosmetically acceptable medium comprising water and at least one organic solvent, at least one polyurethane, and (B) at least one propellant comprising dimethyl ether and at least one C3-C5 hydrocarbon. Dependent claim 13 is directed to anionic polyurethane. Dependent claim 14 is directed to the polyurethane in the amount of 0.5-20%. Dependent claim 16 is directed to the propellant in the amount of 20-70%. Dependent claim 21-22 is directed to the organic solvent is an alcohol selected from at least one lower alcohol, polyols, and polyol ethers. Dependent claim 24 is directed to the composition comprising 0.5-35% water. Dependent claims 26-27 are directed to the organic solvent in an amount of 15-65% and 30-60% respectively. Dependent 28 is directed to instantly claimed additives.

The instant application and copending application are directed to overlapping subject matter wherein both applications are directed to aerosol devices comprising a propellant, a cosmetic medium of a water and solvent (copending dependent claims recite polyols has the solvent), and an anionic polymer.

This is a provisional obviousness-type double patenting rejection.

Claims 9-14 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-29 of copending Application No. 10/796016 in view of US 5639448.

The instant application is directed to an aerosol composition packaged in an aerosol device, comprising: a) at least one anionic fixing polymer present in an amount ranging from 0.5% to 10% by weight, based on the total weight of the aerosol composition, b) at least one polyol with a molecular weight less than 500, present in an amount greater than 15% by weight, based on the total weight of the aerosol composition, c) an aqueous-alcoholic or aqueous medium comprising at least 10% by weight of water, based on the total weight of the aerosol composition, and d) at least one propellant gas in an amount greater than or equal to 30% by weight, based on the total weight of the aerosol composition. Dependent claims glycol, glycerol, and propylene glycol as the polyol.

'016 is directed to an aerosol device comprising a) a cosmetic composition comprising a cosmetically acceptable medium comprising water and at least one organic solvent, at least one polyurethane, and (B) at least one propellant comprising dimethyl ether and at least one C3-C5 hydrocarbon. Dependent claim 13 is directed to anionic polyurethane. Dependent claim 14 is directed to the polyurethane in the amount of 0.5-20%. Dependent claim 16 is directed to the

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propellant in the amount of 20-70%. Dependent claim 21-22 is directed to the organic solvent is an alcohol selected from lower alcohols, polyols, and polyol ethers. Dependent claim 24 is directed to the composition comprising 0.5-35% water. Dependent claims 26-27 are directed to the organic solvent in an amount of 15-65% and 30-60% respectively. Dependent 28 is directed to instantly claimed additives.

US '448 teaches a method of thermo-styling hair. US '448 teaches the cosmetic vehicle is predominately water with a mixture of organic solvents. Suitable solvents known in the art include alcohols, polyols such as glycerol; glycols including propylene glycol in an amount of 1-75%. See column 14, lines 5-10.

The difference between the instant application and copending application is '016 does not claim the instant polyols. However, copending application claims polyols as the organic solvent of choice. Thus, it would have been obvious to a skilled artisan in the art at the time the invention was made to utilize the instantly claimed polyols. One would have been motivated to do so since US '448 teaches the instant polyols (glycerol and PPG) are conventional solvents used in the hair art. Therefore, the instant application and copending application are obvious modifications of each other and are directed to similar subject matter.

This is a provisional obviousness-type double patenting rejection.

Claims 1-25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-25 of copending Application No. 11/124229 in view of US 5639448.

The instant application is directed to an aerosol composition packaged in an aerosol device, comprising: a) at least one anionic fixing polymer present in an amount ranging from

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0.5% to 10% by weight, based on the total weight of the aerosol composition, b) at least one polyol with a molecular weight less than 500, present in an amount greater than 15% by weight, based on the total weight of the aerosol composition, c) an aqueous-alcoholic or aqueous medium comprising at least 10% by weight of water, based on the total weight of the aerosol composition, and d) at least one propellant gas in an amount greater than or equal to 30% by weight, based on the total weight of the aerosol composition. Instant application is also directed to the method of styling hair.

'229 is directed to a composition packaged in an aerosol device comprising, in a cosmetically acceptable medium, at least one anionic fixing polymer, at least one silicone oxyalkylenated, and at least one propellant. Dependent claim 2 is directed to the overlapping anionic polymers claimed in instant claim 2. Dependent claim 5 is directed to the anionic polymer in the amount of 0.05-25%. Dependent claims 13-14 recite dimethyl ether as the propellant. Dependent claim 15 is directed to the propellant in the amount of 25-90% and claim 16 is directed to 35-80%. Dependent claim 17 is directed to the cosmetic vehicle comprising water and a solvent. Dependent claim 18 is directed to the solvent selected from lower alcohols C1-4, polyols, polyol ethers, acetones, and mixtures thereof. Dependent claim 18 is directed to water in an amount less than 20%.

Copending application does not claim the amount of the polyol solvent in the composition.

US '448 teaches a method of thermo-styling hair. US '448 teaches the cosmetic vehicle is predominately water with a mixture of organic solvents. Suitable solvents known in the art include alcohols, polyols such as glycerol; glycols including propylene glycol in an amount of 1-

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75%. See column 14, lines 5-10. US '448 teaches a the propellant is used in an amount of 3-30%.

See column 13, line 50.

The difference between the instant application and copending application is that the instant application requires at least 15% polyols in the independent claim. However, copending application recites polyols and polyol ethers as the organic solvent in the cosmetic medium. Secondly, the copending application does not claim the concentration of polyol solvent. However, it would have been obvious to one of ordinary skill in the art at the time the invention was made to look to US '448 and utilize polyols in the instant concentration. One would have been motivated to do so since US '448 teaches the instant polyols are *conventionally* utilized as solvents in the amount of 1-75% and preferably 5-50% with water. With regard to instant claim 24, copending application claims a process of treating hair with an aerosol device comprising an anionic polymer, a silicone, a cosmetic medium, and a propellant. The difference between instant claim and copending claim is that the process claim does not claim a polyol as the solvent or the concentration. However, it would have been obvious to a skilled artisan to utilize a polyol solvent as the cosmetic medium since US '448 teaches water in combination with polyol solvents in an amount of 1-75% and preferably 5-50% are *conventionally* utilized in hair composition as carriers and solvents. Further, US '448 teaches the amount of propellant conventionally utilized is 3-30% and anionic polymers are used in the amount of 0-0.5%. Thus, US '448 teaches the concentrations of conventional additives used in the hair industry. Therefore, the instant application and copending application are obvious modifications of each other. Further, it should be noted that the manipulation of concentrations of conventional solvents encompassed by the prior art are considered to be prima facie obvious unless there is evidence indicating the amount

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is critical. See *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). Therefore, the instant application and copending application are obvious modifications of each other.

This is a provisional obviousness-type double patenting rejection.

Claims 1-25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 23-50 of copending Application No. 10/279036 in view of US 5639448.

The instant application is directed to an aerosol composition packaged in an aerosol device, comprising: a) at least one anionic fixing polymer present in an amount ranging from 0.5% to 10% by weight, based on the total weight of the aerosol composition, b) at least one polyol with a molecular weight less than 500, present in an amount greater than 15% by weight, based on the total weight of the aerosol composition, c) an aqueous-alcoholic or aqueous medium comprising at least 10% by weight of water, based on the total weight of the aerosol composition, and d) at least one propellant gas in an amount greater than or equal to 30% by weight, based on the total weight of the aerosol composition. Instant application is also directed to the method of styling hair.

Independent claim 23 of '036 is directed to a composition packaged in an aerosol device comprising, in a cosmetically acceptable medium, at least one nonassociative fixing polyurethane and at least on anionic or nonionic associative polyurethane, and a propellant. Dependent claim 35 is directed to the anionic or nonionic polymer in the amount of 0.5-10%. Dependent claim 40 is directed to dimethyl ether as the propellant and claim 41 is directed to the propellant in the amount of 2-90%. Dependent claim 43 is directed to the medium comprising water and a solvent. Dependent claim 44 is directed to a solvent selected from at least lower

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alcohols (C1-C4), alkylene polyol, a polyol ether, and mixtures. Dependent claim 46 is directed to the instantly claimed additives and dependent claims are directed to a cosmetic hair treatment.

Copending application does not claim the amount of the polyol solvent in the composition.

US '448 teaches a method of thermo-styling hair. US '448 teaches the cosmetic vehicle is predominately water with a mixture of organic solvents. Suitable solvents known in the art include alcohols, polyols such as glycerol; glycols including propylene glycol in an amount of 1-75%. See column 14, lines 5-10. US '448 teaches a the propellant is used in an amount of 3-30%. See column 13, line 50. US '448 teaches water more than 10%.

The difference between the instant application and copending application is that the instant application requires at least 15% polyols. However, copending application recites polyols and polyol ethers as the organic solvent in a Markush group. Secondly, the copending application does not claim the concentration of polyol solvent. However, it would have been obvious to one of ordinary skill in the art at the time the invention was made to look to US '448 and utilize polyols in the instant concentration. One would have been motivated to do so since US '448 teaches the instant polyols are *conventionally* utilized as solvents and carriers in the amount of 1-75% and preferably 5-50% with water. Further, it should be noted that the manipulation of concentrations of conventional solvents encompassed by the prior art are considered to be prima facie obvious unless there is evidence indicating the amount is critical. See *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). Therefore, the instant application and copending application are obvious modifications of each other.

This is a provisional obviousness-type double patenting rejection.

Claims 1-25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of copending Application No. 11/220586 in view of US 5639448.

The instant application is directed to an aerosol composition packaged in an aerosol device, comprising: a) at least one anionic fixing polymer present in an amount ranging from 0.5% to 10% by weight, based on the total weight of the aerosol composition, b) at least one polyol with a molecular weight less than 500, present in an amount greater than 15% by weight, based on the total weight of the aerosol composition, c) an aqueous-alcoholic or aqueous medium comprising at least 10% by weight of water, based on the total weight of the aerosol composition, and d) at least one propellant gas in an amount greater than or equal to 30% by weight, based on the total weight of the aerosol composition.

'586 is directed to a composition packaged in an aerosol device comprising at least one non-polyurethane anionic or nonionic fixing polymer, at least one anionic acrylic polymer, and at least one propellant in an amount greater than 20%. Dependent claim 7 is directed to the anionic polymer in the amount of 0.01-30%. Dependent claim 10 is directed to overlapping anionic polymers as claimed in instant claim 2. Dependent claim 14 is directed to 20-80% water. Dependent claim 15 is directed to 20-70% of the propellant. Dependent claims 17-18 recite dimethyl ether as the propellant. Dependent claim 15 is directed to the propellant in the amount of 25-90% and claim 16 is directed to 35-80%. Dependent claim 17 is directed to the cosmetic vehicle comprising water and a solvent. Dependent claim 18 is directed to the solvent selected from lower alcohols, polyols, polyol ethers, acetones, and mixtures thereof. Dependent claim 18

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is directed to water in an amount less than 20%. Claim 20 is directed to the method of styling hair by applying the composition.

Copending application does not claim the amount of the polyol solvent in the composition.

US '448 teaches a method of thermo-styling hair. US '448 teaches the cosmetic vehicle is predominately water with a mixture of organic solvents. Suitable solvents known in the art include alcohols such as ethanol and isopropanol, polyols such as glycerol; glycols including propylene glycol in an amount of 1-75% and 5-50%. See column 14, lines 5-10.

The difference between the instant application and copending application is that the instant application requires at least 15% polyols. However, it would have been obvious for one of ordinary skill in the art at the time the invention was made to look to US '448. US '448 teaches the instant polyols are conventionally utilized as solvents in the amount of 1-75% and 5-50% and are in combination with water as the predominate solvent. Further, it should be noted that the manipulation of concentrations of conventional solvents encompassed by the prior art are considered to be prima facie obvious unless there is evidence indicating the amount is critical. See *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). Therefore, the instant application and copending application are obvious modifications of each other.

This is a provisional obviousness-type double patenting rejection.

Claims 1-25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-36 of copending Application No. 10/479170 in view of US 5639448.

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The instant application is directed to an aerosol composition packaged in an aerosol device, comprising: a) at least one anionic fixing polymer present in an amount ranging from 0.5% to 10% by weight, based on the total weight of the aerosol composition, b) at least one polyol with a molecular weight less than 500, present in an amount greater than 15% by weight, based on the total weight of the aerosol composition, c) an aqueous-alcoholic or aqueous medium comprising at least 10% by weight of water, based on the total weight of the aerosol composition, and d) at least one propellant gas in an amount greater than or equal to 30% by weight, based on the total weight of the aerosol composition.

'170 is directed to a cosmetic composition packaged in an aerosol device comprising a propellant, a liquid phase comprising a cosmetic medium, solid particles, a fixing polymer and/or a thickening polymer and aluminum. Dependent claim 26 is directed to an anionic or nonionic polymer. Dependent claim 27 is directed to an anionic polymer wherein the monomers are sulfonic acids. Dependent claim 29 is directed to a thickening polymer that is a copolymer of acrylic acid and methacrylic acid (anionic polymer). Dependent claim 32 is directed to the polymer in the amount of 0.01-8%. Dependent claim 33 is directed to DME. And claim 35 is directed to the propellant in the amount of 2-90%. Dependent claim 36 is directed to the same additives as recited in instant claims. Dependent claims are directed to a method of styling the hair.

Copending application does not claim a polyol solvent in the composition.

US '448 teaches a method of thermo-styling hair. US '448 teaches the cosmetic vehicle is predominately water with a mixture of organic solvents. Suitable solvents known in the art include alcohols such as ethanol and isopropanol, polyols such as glycerol; glycols including

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propylene glycol in an amount of 1-75% and 5-50%. See column 14, lines 5-10. US '448 teaches a the ethanol in the amount of 0-8% and water more than 10%.

The difference between the instant application and copending application is that the instant application requires at least 15% polyols and at least 10% water. However, it would have been obvious for one of ordinary skill in the art at the time the invention was made to look to US '448. US '448 teaches the instant polyols are conventionally utilized as solvents in the amount of 1-75% and 5-50% and are in combination with water as the predominate solvent to form the liquid carrier in hair compositions. Therefore, it would have been obvious to utilize a polyol in the instant amount with water to form the liquid phase of '170 since the prior art teaches these are conventional carriers. Further, it should be noted that the manipulation of concentrations of additives such as solvents encompassed by the prior art are considered to be prima facie obvious unless there is evidence indicating the amount is critical. See *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). Therefore, the instant application and copending application are obvious modifications of each other.

Conclusion

All the claims are rejected at this time.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sharmila S. Gollamudi whose telephone number is 571-272-0614. The examiner can normally be reached on M-F (8:00-5:30), alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gary Kunz can be reached on 571-272-0887. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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